IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 118 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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PRAVIN @ KANA AMRUTLAL - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR PK SHUKLA for Appellant.
MS DS PANDIT,ADDL.PUBLIC PROSECUTOR for Respondent-State.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 17/10/2007

ORAL JUDGMENT

1. The appellant-orig.accused no.1 (hereinafter referred to as 'the appellant') has preferred the present appeal under Section 374 of the Code of Criminal Procedure, 1973, challenging the judgment and order of conviction and sentence dated 30th November 2005, passed by

the learned Additional Sessions Judge, Fast Track Court No.1, Bhavnagar, in Sessions Case No.18 of 2006, whereby the learned trial Judge has held the orig. accused persons guilty for the charge of offences punishable under Sections 363, 366 and 376 read with Section 114 of the Indian Penal Code, and sentenced the appellant to undergo rigorous imprisonment for two years and a fine of Rs.1000/-; rigorous imprisonment for three years and a fine of Rs.2000/- and rigorous imprisonment for seven years and a fine of Rs.5000/- for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code respectively. The indefault punishment i.e. on non-payment of amount of fine, is prescribed as six months, one year and two years for all these offences respectively.

2. Shri P.K. Shukla, learned counsel appearing for the appellant, has taken me through the judgment and order under challenge and the oral as well as documentary evidence led during the course of trial, and has submitted

that the victim girl had left her parental home with her neighbours-orig. accused persons i.e. present appellant and his wife Sonalben. The said Sonalben was joined as orig.accused no.2 and she was also held guilty for inducing the victim girl to leave the shelter of guardianship of her parents. According to Shri P.K.Shukla, the orig.accused no.2-Sonalben who was held guilty for the offences punishable under Sections 363, 366 and 376 read with 114 of the Indian Penal Code, was not awarded any additional punishment than the period already undergone by her as an under-trial prisoner. No appeal has been preferred by the respondent-State under Section 377 of the Code of Criminal Procedure, 1973 against the said orig.accused no.2-Sonalben. On careful reading of the judgment under challenge, it emerges that both the accused persons were residing in the neighbourhood of the family of the victim girl and as the present appellant was to go out during night hours, at the request of Sonalben, the victim girl was going to the

residence of the appellant so that she could give company to orig.accused no.2-Sonalben; and the parents of the victim girl were sending the victim at the residence of the accused persons. The victim girl was engaged with a boy and it is the case of the prosecution that the appellant was condemning the boy with whom the victim was engaged and simultaneously tempting her to develop relations with him and on the date of incident, the appellant kidnapped the victim girl. Both of them had moved to some places and thereafter, they had started residing at Rajkot. During this period, the appellant had raped the victim against her wish and will. Thereafter, the appellant left Rajkot and ultimately, fetched Sonalben i.e. orig.accused no.2. Thereafter, all the three (orig.accused persons and victim) were residing at Rajkot. It is in evidence that the appellant is physically handicapped person and he used to beg flour. They were consuming the said flour and the remaining/additional flour was being

sold by them and thereby they were maintaining themselves. During the stay of victim with the appellant and orig.accused no.2, the appellant had committed rape on her against her wish and will.

3. The learned trial Judge on evaluation of evidence has held that some element of consent emerging from the conduct of the victim has no relevance because there is ample evidence to show that the victim was below 15 years of age.

4. According to Ms.D.S. Pandit, learned Additional Public Prosecutor, the judgment and order of conviction and sentence recorded by the learned trial Judge is absolutely legal and the same is based on sound reasons. The birth certificate issued by the local self Government and the school authority show the same birth date, and the medical certificate given by the Gynaecologist after examining her also does not speak anything under which it can be inferred that the victim was a grown up

or matured girl. So the alleged consent even if is presumed would not help the appellant, is the finding recoded by the learned trial Judge. Though there were neither visible marks of violence on the body of the victim nor semen or blood stains were there on the clothes of the victim, there was on reason for the learned trial Judge to disbelieve the version of the victim that the appellant committed rape on her against her wish and will and some times even in presence of orig.accused no.2-Sonalben. The hymen was found raptured when the victim was examined. So when the rape was committed once or twice during these days, would be sufficient to hold the appellant guilty. The birth certificate and the School Leaving Certificate have rightly been appreciated in the background of the oral evidence led by the complainant i.e. PW-1 Ashokbhai Dinubhai Solanki-father of the victim, who has been examined vide Ex.11. The opinion evidence corroborates the say of the victim that she was raped by the appellant.

There was no reason for the victim girl to implicate the appellant falsely in this crime. On the contrary, it emerges from record that the appellant must have tempted to win sympathy as he was physically handicapped person, and thereafter, induced the victim girl and kidnapped her. From the evidence led by the prosecution as to the birth date of the victim, it appears that the date of birth of the victim was 11th December 1989. So she had completed about 14 years and 10 months on 11th August 2004 i.e. the day on which the offence of kidnapping was committed. It is not the say of the victim girl that she was raped when she was going to the house of the accused to accompany and to sleep with the wife of the appellant. If she was really interested in falsely implicating the accused persons then she may not have stated in her deposition that first time the rape was committed on her after leaving of her parental home. The version of the victim girl which is at Ex.44 sounds natural and she has stood to the test of

cross-examination made by the defence-side. The victim girl has denied the suggestion that the appellant was demanding money from her father and to avoid payment of the amount due from the appellant, the father of the victim in consultation with her uncle lodged the complaint in question. When it is in evidence that the appellant was practically begging and was not a rich enough to lend money to anyone, there was no question of lending money or parting with money to the father of the victim girl. The suggestions made during the course of cross-examination to the victim girl appear to be afterthought. For a small reason or negligible amount, no father would try to use his teenager daughter who was to marry in recent times to come. True it is that the prosecution is supposed to prove its case beyond reasonable doubt and weakness in the case of the defence side would not add any strength in the case of the prosecution. But here the offence of kidnapping has been proved by the complainant and other witnesses, and

the offences punishable under Sections 366 and 376 of the Indian Penal Code are found proved through the version of the victim girl examined vide Ex.44. The evidence of this victim girl is corroborated to some extent by the medical evidence. Undisputedly, there was no complaint under Section 376 of the Indian Penal Code initially. Trusting the words of orig.accused no.2-Sonalben, some genuine efforts were made to trace out the victim girl. All these contingencies establish that both the accused persons were actively involved for inducing the victim and the appellant was directly responsible for the offence punishable under Section 376 of the Indian Penal Code.

5. It is relevant to note that though the appellant on the date of offence was handicapped, he was aged about 36 years of age. Why a teenager girl would sexually join with a physically handicapped person that too with such a person elder to her. So the learned trial Judge has rightly believed that

as such there is no element of consent, it would not be proper to presume consent. It is observed that if the Court accepts that there is some element of consent, it has no value considering the very tender age of the victim girl vis-a-vis the age of the appellant. This is not a case of a mistake committed by a teenager accused, otherwise this Court could have reduced the punishment to some extent. According to me, this is a case where severe punishment than the minimum prescribed, was required to be imposed and the orig.accused no.2-Sonalben ought not to have been let off by showing leniency while deciding the quantum of punishment qua the wrong committed by her. But as there is neither any appeal by the State against the said orig.accused no.2-Sonalben nor against the present appeal under Section 377 of the Code of Criminal Procedure, 1973, there is no scope for this Court to enhance the sentence of punishment imposed by the learned trial Judge. However, in the present case, the judgment and order of

conviction and sentence under challenge is required to be upheld without any modification even in the quantum of sentence imposed by the learned trial Judge.

6. In view of aforesaid observations and discussion, the present appeal is hereby dismissed. The judgment and order of conviction and sentence dated 30th November 2005 passed by the learned Additional Sessions Judge, Fast Track Court No.1, Bhavnagar, in Sessions Case No.18 of 2005, is upheld.

(C.K. Buch, J)

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